

RAMASAMY @ RAMAN A/L KAMACHEE
& 2ORS.

v.

THAYALAN A/L S.K. PSALANIYANDY
& 63 ORS.

HIGH COURT, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[ORIGINATING SUMMONS NO. 24-602-92]
8 FEBRUARY 1993

TRUSTS: Trust deed empowering trustees to enter into contract for development of property - Beneficiaries refusing to abide by terms of trust deed - Trustees not given power to sell individual lots to new purchasers under the trust deed - Application to Court - Consideration of s. 59 of Trustee Act 1949.

The plaintiffs and the defendants jointly bought a piece of agricultural land with the object of converting it into a housing scheme. The plaintiffs, as trustees, obtained the services of a building contractor to complete the project on the understanding that the beneficiaries would execute sale and purchase agreements with the contractor. Some of the beneficiaries refused to sign the agreement unless the contractor accepted their counter-proposals in spite of the fact that the contractor had expended its own money on the project. As the trust deed did not empower the trustees to sell the individual lots to new purchasers, the plaintiffs sought the assistance of the Court under s. 59 of the Trustee Act 1949.

Held:

[1] Section 64 of the Trustee Act gives the Court the power to make the beneficiary indemnify the trustee where a breach of the terms of the trust has been committed at the instigation or request or with the consent in writing of the beneficiaries.

[2] The 1988 Trust Deed shows that the beneficiaries had agreed to allow the trustees to get the scheme completed on a pro rata basis and the recalcitrant beneficiaries should not be permitted to block the whole project by simply refusing to sign the new agreements or having signed them by refusing to pay unless the contractor knuckles under and accepts their counter-proposals.

[3] In the circumstances, the Court must step in to save the situation subject to the protection

a of the rights of the recalcitrant beneficiaries but only so far as is practicable. In this kind of situation everybody must mitigate his losses as far as he reasonably can.

[Plaintiffs application allowed without prejudice to any claims that the beneficiaries may have against the trustees. The costs of the application to be taxed and paid by the defendants No. 7, 8, 27, 29, 34, 38, 39, 43, 46, 54, 58, 59 and 60].

Legislation referred to:

Trustee Act 1949, ss. 69, 64

c For the plaintiffs - Pushpalingam; M/s. Pushpalingam, S.Y. Soong & Associates
For the 1st to the 63rd defendants - Nadarajah; M/s. K. Nadarajah & Partners
For the 64th defendants - Ranjit Singh; M/s. K. Ranjit Singh & Partners

JUDGMENT

Mahadev Shankar J:

This is an application by Trustees for orders under s. 59 of the Trustee Act 1949. In so far as is material to this application it reads as follows:

e 59(1) Where in the management or administration of any property vested in trustees, any sale, lease, charge, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the Court may think fit and may direct in what manner any money authorized to be expended, and the cost of any transaction, are to be paid or borne as between capital and income.

(2) in amplification and not in derogation of the generally of the foregoing powers the Court may be order under subsection (1) -

h (a) ...

(b) ...

(c) ...

i (d) authorize the doing by the trustees of any act which appears to the Court to be beneficial to the trust estate or to the beneficiaries.

The application is opposed by some of the beneficiaries of the Trust. They constitute a minority of about 1/4 th of this total number.

The land comprised in C.T. 17226 Lot 6978 in the Mukim of Klang (the said land) was just over 4 1/2 acres. It was agricultural land. One Manimaram initially entered into negotiations to buy the said land. He used funds advanced by some twenty-five people. This Manimaram was superseded by K.R. Ramasamy first plaintiff (hereafter referred to as the First Trustee) who increased the number of participants in the scheme to sixty-three. A loan was also obtained from their Co-operative Society, Syarikat Kerjasama Nesa Pelbagai Berhad (Nesa) which got itself registered as the legal owner direct from the vendor on 28 July 1977. The loan to Nesa was subsequently paid off but instead of the land being registered in the names of all the beneficiaries as owners, it is alleged that K.R., Ramasamy (the First Trustee) procured his name alone to be registered as the apparent beneficial owner on 9 September 1980.

To correct this the beneficiaries filed K.L. High Court Civil Suit No. F240 of 1982. They were legally represented by M/s. G.T. Rajan as Counsel and M. Gopal Krishnan. They obtained an *ex parte* injunction against the First Trustee who was represented by Gopal Davidason. By a consent order made on 19 April 1983 the injunction was set aside, two more persons (referred to hereafter as the Second and Third Trustees) were to be appointed additional trustees, together with the first plaintiff who was now formally constituted as Trustee by the Court order, the names of all the beneficiaries were to be endorsed on the title to the said land; and the First Trustee was ordered to submit an account of the moneys he had received up-to-date. It is to be noted that all three Trustees, who are named as plaintiffs in the present application before me, are also named as beneficiary defendants Nos. 20, 28 and 5 respectively. It is not known what happened to this Civil Suit thereafter.

The object of the purchase was to convert the said land into a housing scheme. A meeting was held by all the parties on 9 May 1983. The first Trustee stated that RM 109,850 had been collected and after a payment of RM 105,000 to the Developer (now said to be Nesa) and stamp duty there was only a balance of RM 29 with the lawyer and RM 300 with the First Trustee. I

a would observe here that every beneficiary who had paid anything should have known how much he had paid. I would also observe that the Civil Suit aforesaid was still alive. No complaint was made about these accounts; and no action was taken in the suit. Two additional trustees were elected at this meeting.

b On 11 June 1984 a formal Trust Deed was executed by all three trustees in the presence of M. Gopal Krishnan who had acted for the beneficiaries in the Civil Suit. This document empowered the Trustees to enter into a contract for the development of the property. The beneficiaries were described as joint purchasers of the said land. Clause (e) specifically stated that their names were to be registered on the title only in the event that the said land could not be developed into a Housing Scheme. Thus the earlier requirement under the consent order to have the names of all the beneficiaries put on the Title was superseded.

d Then on 22 June 1984 the First Trustee entered into a joint venture agreement with a Building Contractor called Teng Kong Enterprise Sdn. Bhd. (TKE). The first Trustee is described as such in this agreement. It was prepared by **e** TKE's solicitors. As the registered proprietor the first Trustee was required to give a power of attorney to a Director of TKE to do the needful to get the said land converted from agricultural to building land, apply for sub-division; and put up sixty-three units of double-storey terrace houses at a cost of RM 40,000 each. For this purpose TKE's Director was empowered to mortgage the said land on such times as it deemed fit.

f On or about 13 July 1984 each of the sixty-three beneficiaries entered into a sale and purchase agreement with TKE. The said land was divided into sixty-three lots in four blocks. Lots were cast and each beneficiary was allotted one lot, identified by number together with the house to be built thereon for a cost of RM 40,000 to be paid by way of progress payments. The first was to be paid on execution of the agreement.

g Under the power of attorney aforesaid TKE's Director charged the land to Perwira Habib Bank on 23 August 1984. TKE succeeded in getting conversion and sub-division. They also commenced building operations to a partial extent. Then their business failed and a winding-up petition was presented in the Ipoh High Court.

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Many of the beneficiaries on the other hand had not even paid their down payments in full. After TKE's failure it came to be light that the bank had allowed TKE's Director draw down RM 820,000 even though only about 10% of the work had been completed.

By this time two years had gone by. In 1986, M/s. Pushpalingham S.Y. Soong & Associates solicitors were engaged to get the project out of the morass. One of the additional trustees elected in 1984 resigned. All the beneficiaries met on 15 August 1988 and elected another Trustee in his place. These Three Trustees who are the plaintiffs have executed a new trust deed dated 16 August 1988 which revoked the trust deed dated 11 June 1984. The new trustees persuaded the bank not to foreclose and to reduce the amount required for the redemption of all the titles to RM 450,000. All the beneficiaries are stated in the new trust deed as being desirous of having the scheme completed and the dwelling houses "built and transferred at a value thereof to be given to each joint purchaser in proportion to his/her share in the said land."

The new trustees now had to get a building contractor to complete the project. The first two contractors signed agreements but refused to continue for a variety of reasons. One of them was the attitude of some of the beneficiaries who simply would not pay. In August 1990 Pembinaan Fiba Sdn. Bhd. (Piba) - the 64th defendant in these proceedings - was appointed to complete the project.

Fiba was assured by the trustees that the beneficiaries would each execute a new agreement with them whereby each house was to be completed at a cost of RM 48,000 of which RM 8,000 was earmarked for repayment of the loan to the Perwira Habib Bank for the redemption of the said land and the sub-divided titles now with the Bank.

It is of the utmost importance here to emphasise that Fiba had to put its own money up first for the completion of the project. They then had to look to these beneficiaries for recovery. The sixty-three units are terrace houses in four blocks numbered (1 - 3) (14 - 27) (28 - 45) and (46 - 63). But terrace houses cannot be completed individually. They must be completed block by block.

Fifty-four beneficiaries signed the Fiba agreements in February/March 1991. Believing the

a trustees assurance that all the beneficiaries would sign, Fiba proceeded with the works and have expended RM 1.7 million to date. They are locked into the development now and must finish if they are to recover.

b It is at this juncture that some of the beneficiaries proceed to hold Fiba to ransom with counter-proposals which they wanted to compel Fiba to accept. Nine beneficiaries refused to sign Fiba's agreement outright. Out of the fifty-four who have signed another nine have resiled and are now also opposing any proposal which will result in their having to pay RM 48,000 for completion of their units.

c Forty-seven of the beneficiaries support the trustees, and it is clear that if this impasse is not broken everybody will suffer. Fiba will have to abandon the project and the scheme will be back to square one.

d The trust deed dated 16 August 1988 does not give the trustees powers to sell the individual lots to new purchasers. Without this power the trustees cannot move. So they have come to Court.

e Section 64 of the Trustee Act gives the Court the power to make the beneficiary indemnify the Trustee where a breach of the terms of a trust has been committed at the instigation or request or with the consent in writing of the beneficiaries. The evidence suggests these beneficiaries accepted the accounts rendered by the first Trustee in 1984. The terms of the Trust Deed in 1984 shows that they agreed to their names being kept off the Title till the sub-divided titles were made over to them. The 1988 Trust Deed shows they agreed to allow the Trustees to get the scheme completed on a pro-rata basis. Should the recalcitrant beneficiaries be permitted to block the whole project by simply refusing to sign the Fiba agreements, or having signed them, by refusing to pay unless Fiba knuckles under and accepts their counter-proposals? These are firstly that they accept Fiba's price of RM 48,000 but that Fiba must reduce its price by the total amount each of these beneficiaries have paid TKE even though FIBA had nothing whatsoever to do with TKE. The second proposal is that the trustees should transfer free of charge to the fourteen recalcitrant beneficiaries the whole of the second block which contains fourteen lots, so that these beneficiaries may themselves redeem these lots from the bank and develop the lots themselves.

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Their third proposal is that a buy-out of their lots be forced on the others at a price of RM 15,000 for the land in each lot plus whatever they have paid TKE. In short whilst the scheme has suffered a misfortune these beneficiaries want to rewrite the 1988 trust deed to which they were parties, so that they can now get their chestnuts out of the fire with a minimum of loss * to themselves. Perhaps they thought that by digging in, Fiba could be forced to come to terms because there is no other way this development could proceed.

In these circumstances it is the opinion of this Court that it must step in to save the situation c subject to the protection of the rights of the recalcitrant beneficiaries but only so far as is practicable. In this kind of situation everybody must mitigate his losses as far as he reasonably can.

Accordingly I hereby make an order in terms of the application Enclosure (1) to empower the trustees to sell to third parties the lots allotted to all those defendants who have not signed up their agreements with Fiba, or who having signed up such agreements have not complied with them as required by the terms thereof as regards payments to be made thereunder or otherwise and to exchange such lots to be sold with those defendants who have complied with agreements with Fiba, as maybe deemed necessary and subject to their consent, so as to substitute their lots for sale.

In each case I further order that the trustees shall file full accounts of all sales made with this Court and serve the same on the solicitors of the beneficiaries affected thereby.

By way of further relief I give the parties general liberty to reply.

The nett balance due to each of the recalcitrant beneficiaries after deduction for all amounts due from them shall be deposited in Court unless otherwise ordered. Their grievances all arise from alleged breaches of trust by the first trustee in registering his name as proprietor, by allegedly permitting or failing to prevent TKE's Director from drawing down RM 820,000, by failing to recover moneys on the winding-up of TKE, and by failing to get a cheaper contractor to complete this project for them. Alternatively it is a claim for damages allegedly due to them for the failure to provide a completed house for them at a cost of RM 40,000 within twenty-four

a months of their agreement with TKE dated 13 July 1984. These are nebulous claims but out of deference to the wisdom of these defendants and their advisors, I now make a specific order that these claims and any other claims they wish to make against the trustees or against TKE shall in no way be prejudiced by the orders I have made in this application.

b Accordingly they may be pursued at the appropriate time subject to the following observations. The costs of this application shall be taxed and paid by the defendants No. 7, 8, 27, 29, 34, 38,39,43,46,54, 58, 59 and 60. Such payment shall be made pro rata out of the nett balance due to each of these defendants after deduction of all other dues from the sale price of their lots or the lots for which those lots were exchanged prior to the sale.

d It is always easy to be wise after the event. It is also much easier to be destructively critical rather than positively constructive. From the time M/s. Pushpalingam & Co. were appointed to try and save a near impossible situation it is the view of Court that they did well to bring things within sight of a resolution which may not be perfect but is at least practical. It is to be hoped that the way will now be open for the completion of this project so that those who wished that result will have their houses *albeit* at somewhat higher cost, and the others can be left free to pursue their money claims after they have been properly quantified.

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